FILED

DEC 4 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 460

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

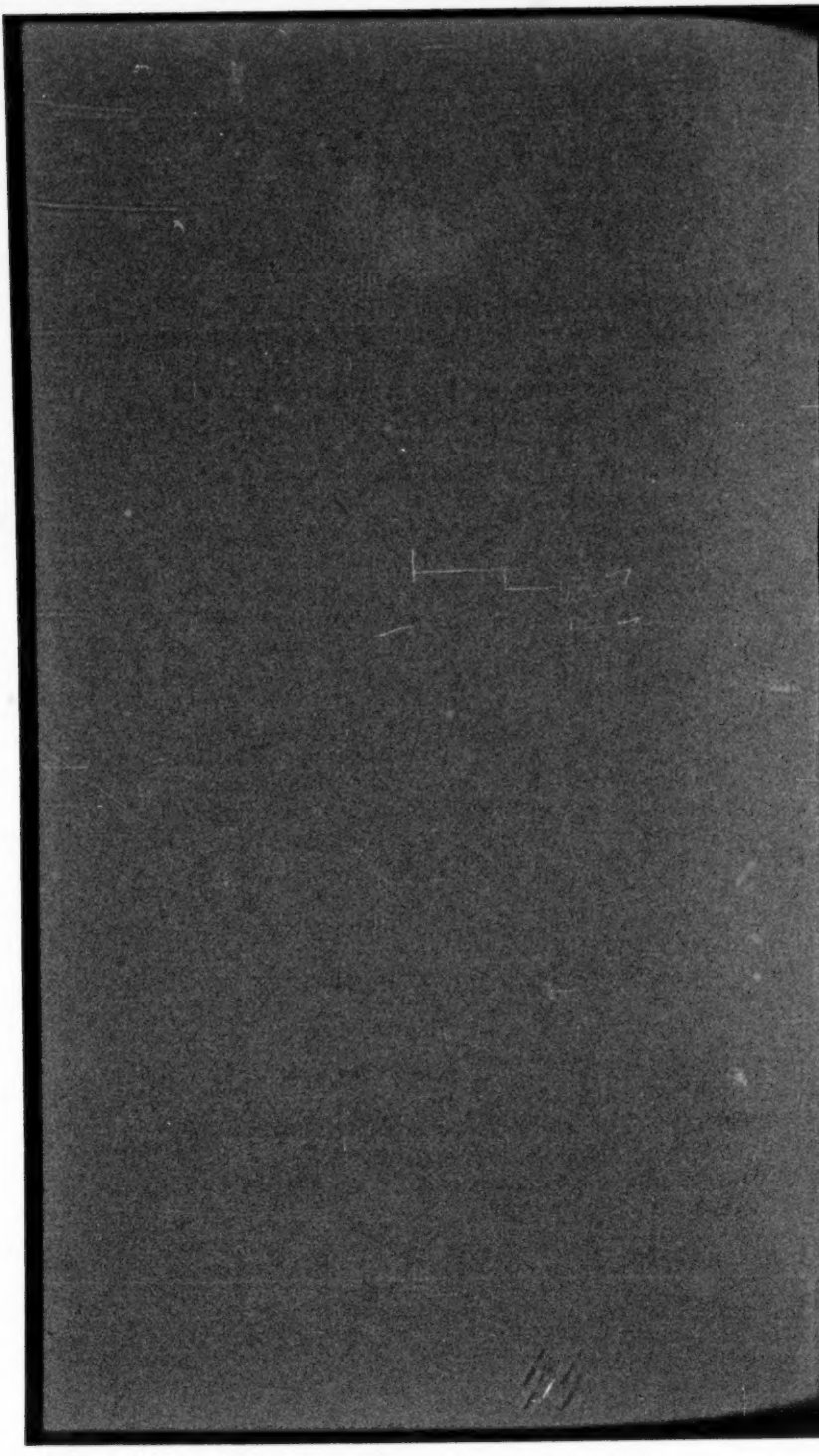
RILEY C. GARNER, County Trustee of Shelby County, Tennessee, and SHELBY COUNTY, TENNESSEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT AS TO JURISDICTION

CHARLES A. HELSELL,
135 East Eleventh Place,
Chicago, Illinois;

LUCIUS E. BURCH, JR.,
1006 Exchange Building,
Memphis, Tennessee,
Counsel for Appellant.



INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Nature of case and statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	6
Date of judgment and date of application for appeal therefrom	7
Manner in which federal question was raised	8
The questions involved are substantial	10
Cases sustaining jurisdiction of the United States Supreme Court	11
Copies of all opinions delivered in connection with the judgment sought to be reviewed	12
Appendix "A"—Opinion of the Chancellor overruling demurrer to amended and supplemental bill	13
Appendix "B"—Opinion of the Supreme Court of Tennessee reversing the action of the Chancellor and remanding cause for further proceedings	18
Appendix "C"—Decree of Chancellor sustaining demurrer to second amended and supplemental bill	20
Appendix "D"—Opinion of the Supreme Court of Tennessee affirming the action of the Chancellor in sustaining demurrer and dismissing bill	21
Appendix "E"—Opinion of the Supreme Court of Tennessee denying petition for rehearing	28

Table of Cases Cited

Broad River Power Co. v. *South Carolina,* 281 U. S. 537, 74 L. Ed. 1023	12
Charleston Federal Savings & Loan Association v. *Alderson,* 324 U. S. 182, 89 L. Ed. 857	11
Greenough v. *Tax Assessor,* 331 U. S. 486, 91 L. Ed. 1621	12

Page

Hamilton v. *Regents of the University of California*, 293 U. S. 245, 79 L. Ed. 343 11
Hoover & A. Company v. *Evatt*, 324 U. S. 652, 89 L. Ed. 1252 11
Market Street Railroad Co. v. *Railroad Commission of California*, 324 U. S. 548, 89 L. Ed. 1171 11
Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649, 86 L. Ed. 1090 11
Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836 11
Pollock v. *Williams*, 322 U. S. 48, 28 L. Ed. 1095 11
Postal Teleg. Cable Co. v. *Newport*, 247 U. S. 464, 62 L. Ed. 1215 11
Sterling v. *Constantin*, 287 U. S. 387, 77 L. Ed. 375 11
United Gas Public Service Co. v. *Texas*, 303 U. S. 123, 82 L. Ed. 702 11
Williams v. *North Carolina*, 325 U. S. 226, 89 L. Ed. 1577 11

STATUTES CITED

Act of June 25, 1948, C. 646, 62 Stat. 929 of the Judicial Code, 28 U. S. C. A., Sec. 1257(2) 1
Williams' Tennessee Code, Section 1535 ..... 6, 10
United States Code, Title 28, Section 2101 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 460

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

RILEY C. GARNER, COUNTY TRUSTEE OF SHELBY COUNTY, TENNESSEE, AND SHELBY COUNTY, TENNESSEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under the Act of June 25th, 1948, C. 646, 62 Stat. 929 of the Judicial Code, 28 U. S. C. A. Sec. 1257 (2), from a final judgment to the Supreme Court of Tennessee entered July 27, 1951, timely petition for rehearing denied, August 31, 1951. The above cited Judicial Code provides that a final decision, rendered in the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its

being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

The facts from which the case arises may be briefly stated as follows:

The appellant is a railroad company whose property in the State of Tennessee is assessed for ad valorem taxation by the Railroad and Public Utilities Commission and the State Board of Equalization. The applicable statutes will be examined later herein.

On August 1, 1947, the Railroad and Public Utilities Commission made a tentative biennial assessment of State ad valorem taxes for the years 1947-1948 against appellant's property in the State of Tennessee. The matter was appealed to the State Board of Equalization, the basis of the appeal being that the Commission failed to recognize the fact that the Illinois Central Railroad Company and "Illinois Central Railroad Company, Y&MV Branch" were one and the same legal entity and could not be made the subject of separate assessments.

The State Board of Equalization had failed to grant the relief sought by the appeal and on November 6, 1947, entered its order fixing the final assessment without change from that made by the Railroad Commission, to-wit, an aggregate or combined assessment of $35,581,254.00. Under the Tennessee assessment procedure, after the assessment is made on a unitary basis, it is certified by the State Board of Equalization back to the Railroad and Public Utilities Commission. Then it is the duty of the Railroad and Public Utilities Commission to "extend" the assessment, which consists of certifying to the tax collectors of the counties and municipalities of the State the value of the taxpayer's property subject to taxation within such county or munici-

pality. The county or municipal collector then applies the local tax rate to the assessment and presents the taxpayer with a bill. Then, and then only, is the tax due and payable under the statutes of the State of Tennessee.

Having exhausted its administrative remedies before the State Board of Equalization, and knowing full well that if the assessment was ever "extended" to the many counties and municipalities through which the taxpayer's lines run, no remedy would be available except to bring suit against each of the collectors of the forty or more governmental units, and feeling that the entire procedure before the Railroad and Public Utilities Commission and the State Board of Equalization was void by reason of the failure of those bodies to follow the statutes establishing and limiting their jurisdiction, and feeling further that no adequate remedy was provided by the possibility of suing each of the separate collectors, the appellant filed a suit in the District Court of the United States for the Middle District of Tennessee, Nashville Division, to enjoin the Attorney General and the members of the Railroad and Public Utilities Commission from certifying or enforcing collection of taxes under the aforesaid attempted assessment by the State Board of Equalization.

Concurrently with the pendency of the suit in the United States District Court at Nashville, the appellant filed a petition for a writ of certiorari against the Governor and the State Board of Equalization in the Third Circuit Court of Davidson County, Tennessee, seeking to have the assessment set aside.

On January 5, 1948, the District Court of the United Sates issued a restraining order, enjoining the Railroad and Public Utilities Commission from extending the taxes on the challenged assessment and enjoining the certification of the taxes to the County Court Clerks of any county or the Mayors of any municipalities within the State of Tennessee.

On January 26, 1948, the Third Circuit Court of Davidson County, Tennessee, decreed that the aforesaid attempted assessment had been made in violation of methods prescribed by law and adjudged that "said assessments are hereby declared to be illegal, null and void, and the same are hereby quashed", and the cause was remanded to the State Board of Equalization for further proceedings as authorized by law, including the making of a new and proper assessment for the biennium 1947-1948.

At the time of the entry of the order in the Third Circuit Court of Davidson County quashing the assessment, the restraining order issued by the United States District Court was in full force and effect, and because the order of the Third Circuit Court of Davidson County quashing the assessment rendered the matter moot, the suit in the United States District Court was dismissed without prejudice.

It may be pointed out here that no appeal was taken by any party from the judgment of the Third Circuit Court of Davidson County declaring the assessment null and void, or from the order of the United States District Judge enjoining the extension or collection of taxes based upon the void assessment. Furthermore, because there never was an "extension" of the assessment, no taxes were due and payable and the taxpayer had no opportunity whatever to pay the tax even had it desired to do so.

Upon the remand of the cause to the Railroad and Public Utilities Commission, a new assessment was made on October 26, 1948, whereunder the property of the appellant was assessed at a total valuation of $28,900,000 as compared to $35,581,254, the amount of the previous void assessment. No exception was taken to the second assessment by appellant and the taxes for the year 1947 were extended and certified to appellee Shelby County in the amount of $107,254.00 which is correspondingly or proportionately less

than a similar extension would have been on the original void assessment.

Appellant promptly tendered to the appellees $107,254.00, which was the exact amount of taxes due upon the new assessment, but the tender was refused on the ground that the appellant owed the appellees, in addition to the taxes, interest and penalties in the amount of $8,581.92 which allegedly accrued from November 6, 1947, the date upon which the first assessment had been made which, as stated, had been adjudicated to be void, and on which assessment no levy had ever been made. The claim for interest and penalties was made notwithstanding that appellant had been entirely successful in the litigation which it had instituted, and despite the fact that at no time had there been an opportunity for the appellant to pay taxes other than those which it tendered.

The amount claimed as interest and penalties was paid under protest to the appellees involuntarily and under duress in fact.

All of the foregoing facts appeared in a bill filed by appellant in the Chancery Court of Shelby County, Tennessee, in the year 1949, in which it sought to recover the interest and penalties collected under protest and duress. The appellees demurred to the bill and, after argument of the demurrer, the learned Chancellor delivered an exhaustive opinion in which he found the judgments of the Davidson Circuit Court and of the United States District Court, being final and unappealed from, had conclusively established that the first purported assessment was illegal, null and void, and that no taxpayer could lawfully be burdened with penalty or interest for non-payment of taxes until such taxpayer had had an opportunity to pay taxes based upon a valid, lawful assessment. In accordance with his opinion, the Chancellor overruled the appellees' demurrer and entered a final decree for appellant in the amount of $8,581.92.

The appellees perfected an appeal and at the December term, 1949, the Supreme Court of Tennessee delivered an opinion, reversing the Chancellor and holding that penalties and interest could be collected, even though the assessment was void and a legal nullity and even though the taxpayer had never had an opportunity to pay the taxes, and the case was remanded for further proceedings. Upon remand of the case to the Chancery Court of Shelby County, appellant amended its bill so as to set out *in extenso* the proceedings in the United States District Court and made specific claim of certain rights, privileges and immunities arising under the Constitution of the United States, the nature of which will be more fully hereinafter set out.

To the Second Amended and Supplemental Bill the appellees again demurred. This time the learned Chancellor delivered an opinion, stating that he felt bound by the previous decision of the Supreme Court of Tennessee, and the demurrer was accordingly sustained and the Second Amended and Supplemental Bill was dismissed.

The case then proceeded again to the Supreme Court of Tennessee and the Court delivered an opinion sustaining the action of the Chancellor. A timely petition to rehear was filed but it was overruled.

II. State Statute, the Validity of Which Is Involved

There was drawn in question in this case the validity of Section 1535 of Williams' Tennessee Code, which is as follows:

> "1535. *Board to certify the valuations fixed which shall be final and conclusive.*—On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this law, and the action of the board of equalization in fixing the valuation upon such property shall be conclusive and final and the valu-

ation so fixed shall be assessed against said property and the taxes due thereunder be paid. Provided, that if any railroad or public utility has been or shall hereafter be aggrieved at the assessment so fixed and certified by the board of equalization, such railroad or public utility shall be required to pay the taxes due and owing the State of Tennessee, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceeding that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the State of Tennessee, the counties and municipalities, and any school district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered in any such proceeding, or in default of such refund, such railroad or public utility is authorized to take credit for the amount of such illegal or excessive tax with interest against any tax thereafter becoming due from and payable by such railroad or public utility, to the State of Tennessee, or any county, municipality, road district, school district, or any other taxing district authorized by law to levy taxes.

No contention is made that the above quoted statute is necessarily or in all cases unconstitutional. It is contended that said statute, as interpreted by the Supreme Court of Tennessee and as applied to the facts in this particular case, is unconstitutional.

III. Date of Judgment and Date of Application for Appeal Therefrom

The judgment, decree and decision herein appealed from was entered July 27, 1951, copy of which is appended hereto. Finality thereof was stayed by appellant's filing, within the time prescribed by the Rules of the Supreme Court of

Tennessee, its petition to rehear, which was denied by the Supreme Court of Tennessee on August 31, 1951. Appellant's petition for appeal was presented and said appeal was allowed on the fifth day of November, 1951, within ninety days after the entry of such judgment, decree and decision sought to be reviewed and, hence, timely (Section 2101, Title 28, United States Code Revised).

IV. Manner in Which Federal Question was Raised

The Federal questions in this case were raised both in the Chancery Court of Shelby County, Tennessee, in which court the action was instituted, and in the Supreme Court of the State of Tennessee, to which court appeal was taken and which court is the court of last resort in the State of Tennessee.

The Second Amended and Supplemental Bill filed in the Chancery Court of Shelby County charged:

> "That the collection of $8,581.92 as aforesaid deprives complainant of its property without due process of law contrary to the Constitution of the United States.
>
> That the collection of $8,581.92 as aforesaid deprives the complainant of the equal protection of the law contrary to the Constitution of the United States.
>
> That if Section 1535 of the Code of Tennessee is construed in accordance with the contention of the defendants and it is judicially determined that said section furnishes the sole remedy of a taxpayer, in the absence of a valid assessment, then Section 1535 of the Code of Tennessee as so construed is unconstitutional in that it deprives this complainant of property without due process of law and deprives the complainant of the equal protection of the laws, contrary to the Constitution of the United States.
>
> That if Section 1535 of the Code of Tennessee is construed in accordance with the contention of the defendants and it is judicially determined that said section

furnishes the sole remedy of a taxpayer in the absence of a valid assessment, then such judicial determination and said Section 1535 as so construed are unconstitutional as being in conflict with Article VI of the Constitution of the United States."

The Chancellor sustained the demurrer to the Second Amended and Supplemental Bill and dismissed said bill and a copy of the final decree is appended hereto.

On appeal, the Federal questions were raised in the Supreme Court of the State of Tennessee by Assignments of Error as follows:

(d) The decree of the Honorable Chancellor establishes the rights and liabilities of Appellant in a manner inconsistent with the previous final judgments of courts of competent jurisdiction, and thereby deprives Appellant of its property without due process of law and deprives the Appellant of the equal protection of the laws contrary to the Constitution of the United States.

(e) The decree of the Honorable Chancellor in denying the Appellant the right to recover interest and penalties collected under protest and duress because of the refusal of Appellant to pay taxes based upon an illegal and void assessment, deprives the Appellant of its property without due process of law and deprives the Appellant of the equal protection of the laws contrary to the Constitution of the United States.

(f) The decree of the Honorable Chancellor, holding that Section 1535 of the Code of Tennessee furnishes the sole remedy of Appellant, contrary to the previous final judgments of the United States District Court at Nashville, is in conflict with Article IV, Section 1, and Article VI of the Constitution of the United States and of the Statutes of the United States in such cases made and provided prescribing the effect to be given the judicial proceedings of the courts of the United States and the judicial power thereof."

The Supreme Court of Tennessee overruled all of the assignments of error and affirmed the decree of the Chancellor. Copy of opinion of the Supreme Court of Tennessee in sustaining the decree of the Chancery Court of Shelby County, and copy of opinion of Supreme Court of Tennessee in denying petition to rehear are appended hereto.

V. The Questions Involved are Substantial

A. The Supreme Court of the State of Tennessee construed Section 1535 of the Code of Tennessee and related statutes to sanction the seizure of appellant's property under duress for failure to pay a tax that was not levied and was not due and could not have been paid by appellant under protest or otherwise.

B. The Supreme Court of the State of Tennessee, in construing Section 1535 of the Code of Tennessee and related statutes, held that appellant might be required to pay a penalty for failure to pay a tax which, admittedly, had not been assessed in conformity with laws of the State of Tennessee.

C. The Supreme Court of the State of Tennessee, in its decision construing Section 1535 of the Code of Tennessee and related statutes to permit the imposition of a penalty for successfully resorting to the courts of the United States to obtain relief and imposed a penalty upon appellant for obtaining adequate relief under the laws of the United States instead of being content with the limited and inadequate remedies provided by said Section 1535 of the Code of Tennessee.

D. The Supreme Court of the State of Tennessee repudiated and refused full faith and credit to the final judgments of the Circuit Court of Davidson County, Tennessee, and of the United States District Court at Nashville, even though said judgments had been entered in the same cause,

between the same parties and no review of said judgments was sought by any party at any time.

VII. Cases Sustaining Jurisdiction of the United States Supreme Court

A. The appeal, having been perfected within ninety days from the date on which the judgment of the Supreme Court of Tennessee became final, is timely (Section 2101, Title 28, U. S. Code, Revised).

B. Appeal is the proper remedy for review of the decision of the State Court of last resort in favor of the validity of a state statute where the statute is alleged to contravene the Federal Constitution (Section 1257, Title 28, U. S. Code, Revised).

Hamilton v. *Regents of the University of California*, 293 U. S. 245, 79 L. Ed. 343;

Charleston Federal Savings & Loan Association v. *Alderson*, 324 U. S. 182, 89 L. Ed. 857;

Market Street Railroad Co. v. *Railroad Commission of California*, 324 U. S. 548, 89 L. Ed. 1171;

Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836;

Postal Teleg. Cable Company, v. *Newport*, 247 U. S. 464, 62 L. Ed. 1215;

Sterling v. *Constantin*, 287 U. S. 387, 77 L. Ed. 375;

Pollock v. *Williams*, 322 U. S. 4, 28 L. Ed. 1095;

Williams v. *North Carolina*, 325 U. S. 226, 89 L. Ed. 1577;

Hoover & A. Company v. *Evatt*, 324 U. S. 652, 89 L. Ed. 1252;

United Gas Public Service Co. v. *Texas*, 303 U. S. 123, 82 L. Ed. 702;

Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649, 86 L. Ed. 1090;

Broad River Power Company v. *South Carolina*, 281 U. S. 537, 74 L. Ed. 1023;

Greenough v. *Tax Assessor*, 331 U. S. 486, 91 L. Ed. 1621, 1630.

VIII. Copies of All Opinions Delivered in Connection with the Judgment Sought to be Reviewed

Appellant appends to this Jurisdictional Statement copies of the following judgments and opinions:

(a) Opinion of the Chancellor overruling demurrer to Amended and Supplemental Bill.

(b) Opinion of the Supreme Court of Tennessee reversing the action of the Chancellor and remanding cause for further proceedings.

(c) Decree of Chancellor sustaining demurrer to Second Amended and Supplemental Bill.

(d) Opinion of the Supreme Court of Tennessee affirming the action of the Chancellor in sustaining demurrer and dismissing bill.

(e) Opinion of the Supreme Court of Tennessee denying petition for rehearing.

WHEREFORE, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257, Title 28, United States Code, Revised.

Dated this 3rd day of November, 1951.

CHARLES A. HELSELL,
135 East Eleventh Place,
Chicago, Illinois;

LUCIUS E. BURCH, JR.,
1006 Exchange Building,
Memphis, Tennessee,
Attorneys for Appellant.

APPENDIX "A"

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

No. 51609 R. D.

ILLINOIS CENTRAL RAILROAD COMPANY, *Complainant*

vs.

RILEY C. GARNER, County Trustee, et al., *Defendants*

OPINION

Complainant's Amended and Supplemental Bill seeks to recover interest and penalties paid under protest to defendants. Assessment of the property of Complainant pursuant to Sections 1508-1540 of the Code of Tennessee was made by the Railroad and Public Utilities Commission for the biennium 1947-1948 on August 1, 1947. Appeal was taken by Complainant to the State Board of Equalization. The Board of Equalization, after hearing, approved the action of the Railroad and Public Utilities Commission and fixed the assessment at the valuation found by the latter, on November 6, 1947.

On January 5, 1948, upon application of complainant, the U. S. District Court at Nashville enjoined extension of taxes on the basis of such assessment and certification to the various collectors. Contemporaneously complainant filed its petition for certiorari in Davidson County Circuit Court seeking to set aside the assessment on the ground that same was illegal, null and void for reasons stated in the petition.

Thereafter, on January 28, 1948, the Davidson Circuit Court found and adjudged the assessment to be illegal, null and void and quashed same. The injunction case in the U. S. District Court was then dismissed.

No review of the judgment of the Davidson Circuit Court was sought. Subsequently the property of complainant was re-assessed on October 26, 1948 in keeping with the decision of the Davidson Circuit Court; and upon certification of

the valuation to the Shelby County Trustee, the complainant made timely tender of the 1947 tax on the basis of this second assessment. The Trustee of Shelby County refused the tender of the tax, demanding the additional sum of $8,581.92 of interest and penalties claimed to have accrued under Code Section 1547 since May 1, 1948 and March 1, 1948, respectively.

On December 28, 1948 complainant paid such interest and penalties under duress and protest. Suit to recover the above mentioned sum of penalties and interest is now met by demurrer of the County and Trustee, which is bottomed on the proposition that the terms of Code Section 1535 provide the exclusive remedy of the taxpayer who deems himself aggrieved at assessment; that this statute requires payment of tax on the questioned assessment as a prerequisite to avoidance of interest and penalties—that since complainant did not comply with Section 1535 by payment of the tax on the basis of the questioned assessment, interest and penalties inexorably accrued under Code Section 1547.

In addition to the difficulties indigenous to tax litigation, the pivotal issues of the present controversy are somewhat further obscured as the result of procedural steps taken or omitted.

In addition to the arguments of counsel, the Court has pondered aspects which this case might have assumed in an effort to see with clarity the effect of what has in fact occurred. If the pattern of procedure delineated in N. C. & St. L. RR. Co. vs. Browning (1940), 176 Tenn. 245 had been adhered to, the basic problem here for disposition would have appeared in clear relief. This is not said in criticism for one has only to consider the opinion in American Can Company vs. McCandless (1945), 183 Tenn. 491, to become aware of the many doubts which have assailed both Bench and Bar in cases of this nature. The procedure followed, in part at least, rested upon the authority of Briscoe vs. McMillan (1906), 117 Tenn. 115. While this case has been quite lately referred to, there is at least grave doubt that its holding should have application in any case falling within the purview of Code Section 1535. That decision dealt with

the Act of 1873, now 1790-1795 of the Code of Tennessee. It was pointed out that the provisions of that Act fixed an exclusive remedy for the taxpayer and proscribed injunction or other preventive writs against State taxes in relation to the collection thereof. It was the assessment that was under question in Briscoe vs. McMillan, supra. On the other hand, the mandatory provisions of Section 1535, fixing the taxpayer's remedy and requiring payment of the tax on the questioned assessment explicitly relate to the taxpayer as "aggrieved at the assessment".

For this and other reasons, none of which it is necessary to state, the soundness of basis for the U. S. District Court's injunction is subject to grave doubt, to say the least. However, that incident has no real significance.

Long prior to the time that either penalties or interest could have accrued against complainant for delinquency in payment of tax certified upon the controverted assessment the Davidson Circuit Court had granted certiorari to review action of the Board and Commission, had held such assessment illegal, null and void and quashed the same. Since that decision amply antedated any potential delinquency of complainant taxpayer, no preventive writ was necessary. Parenthetically, it may be said that if action of the Commission and Board were found so flagrantly illegal, irregular, fraudulent or in excess of jurisdiction, no reason is perceived why the Davidson Circuit Court could not have granted an implementary supersedeas. As the Supreme Court has said on more than one occasion statutes of the character of Code Sections 1790, et seq and 1533 are dependent upon the presupposition that the quasi judicial functions of the tax assessing authorities and prescribed procedures have not been palpably disregarded.

Stripped of diverting influences the instant case now is that the Davidson Circuit Court has held void and quashed the original biennial assessment of complainant's property. No extension or certification of tax was made under such assessment. Not until many months after the claimed accrual of interest on May 1, 1948 and penalty beginning on March 1, 1948 was there an assessment of complainant's property and an extension of a payable tax.

It is not for this Court, nor indeed for any other at this date, to say that the judgment of the Davidson Circuit Court was wrong. It seems quite clear that had defendants sought review of that judgment and been successful in having the Supreme Court reverse and thus reinstate the assessment of the Commission and Board, in whole or in part, the complainant taxpayer would have been in the position of a wholly or partially unsuccessful contestant of tax liability; and complainant taxpayer would then have by-passed the date of delinquency of its 1947 tax and would thus have incurred the interest and penalties under Code Section 1547. But the complainant taxpayer has successfully contested fixation of tax liability upon it. If in the final analysis this is the determinative consideration, there is abundance of authority that there is no liability for penalty or interest on a tax which, it is held, there is no obligation to pay on the part of the taxpayer. Under the provisions of Code Section 1547, interest and penalty are to be computed on the tax. As stated, the present case is here on the basis of Davidson Circuit Court's authoritative conclusion that the review sought by the taxpayer was proper, that the taxpayer's proposition was sound, that the action of the Commission and the Board was void, that is a nullity. The result is that until the subsequent assessment was made, there was no assessment. The situation here is to be vitally differentiated from that wherein self-assessing types of taxes, such as privilege or excise, are involved. In such instances the tax statutes are self-executing and tax liability flows immediately from the statute itself. In the case of ad valorem taxation where there is no assessment, there is no basis of tax. There can be no tax until there is an assessment. There can be no obligation to pay until there is an assessment and a tax. Cooley, on Taxation, puts it: "When taxes are to be levied upon property, the valuation of it is obviously indispensable. It is required as the first step in proceedings against individual properties subject of tax and is the foundation of all which follow it. Without assessment, they have no support and are nullities. A want of assessment is not a mere irregularity." A rather trenchant statement of the matter is to be found in Cooley on Taxa-

tion, 4th ed., Sec. 1045. It should be kept in mind at this point also that it is the universal rule that no amounts of pecuniary penalty may be exacted for delay in payment of taxes unless authority therefor is given by legislative enactment. As previously mentioned, in this State, penalties and interest are computed on the amount of tax liability. Tennessee is among those States which recognize the rule that all statutes of this nature must be construed strictly, as appears from the citation of authorities in support of the text in Cooley on Taxation (4th ed.) Sec. 1273.

Probably as a corollary to what has been said, it is also well established that a taxpayer is not to be charged with penalty or interest for non-payment of taxes until he has had an opportunity to pay them. This rule is assuredly one to be enforced in equity. There is abundant authority for the proposition, with respect to ad valorem taxation, that the taxpayer may not be charged with penalty until there has been an identification of the property subject to taxation and a determination of the amount of taxes due upon it.

All the efforts of both Court and counsel have disclosed no respectable authority imposing penalty upon a taxpayer who has successfully contested liability for the entire tax.

If all the foregoing were otherwise, it seems quite likely that under the view taken by the Supreme Court in such cases as State vs. Rowan (1937), 171 Tenn. 612, and others, this would not be a proper case for the imposition of penalty or interest, as a matter of equity. The language of the opinion in Brewing Co. vs. Currier (1912), 126 Tenn. 535, is deemed apt in this same connection.

The result is that the demurrer of defendants is in all respects overruled. This seems quite clearly a proper case for discretionary appeal, looking forward to a prompt and final disposition of this controversy.

____ ____,

Chancellor.

APPENDIX "B"

(Filed June 9, 1950, David S. Lansden, Clerk.)

For Publication PREWITT, J.

SHELBY EQUITY

ILLINOIS CENTRAL RAILROAD COMPANY

v.

RILEY C. GARNER, COUNTY TRUSTEE OF SHELBY COUNTY, TENNESSEE, AND SHELBY COUNTY, TENNESSEE

OPINION

Complainant, Illinois Central Railroad Company, seeks to recover interest and penalties paid under protest to defendants, Riley C. Garner, County Trustee of Shelby County, Tennessee, and Shelby County, Tennessee. On August 1, 1947, the Railroad and Public Utilities Commission assessed the property of complainant for the 1947-1948 biennium under sections 1508-1540 of Williams' Code. From this assessment complainant appealed to the State Board of Equalization. The State Board of Equalization, after hearing, approved the action of the Railroad and Public Utilities Commission and fixed the assessment at the valuation found by the Commission.

On January 5, 1948, upon application of complainant, the United States District Court at Nashville enjoined extension of taxes on the basis of such assessment and certification to the various collectors. At the same time complainant filed its petition for certiorari in the Circuit Court of Davidson County, seeking to set aside the assessment on the ground that same was illegal, null and void for reasons stated in the petition.

On January 28, 1948, the Circuit Court of Davidson County held the assessment to be illegal, null and void. The injunction case in the United States District Court was then dismissed.

No review of the judgment of the Circuit Court of Davidson County was sought. The property of complainant was reassessed on October 26, 1948, under the decision of the Circuit Court of Davidson County; and upon certification of the valuation to the Shelby County Trustee, complainant made timely tender of the 1947 tax on the basis of this second assessment. The Trustee of Shelby County refused the tender of the tax, demanding the additional sum of $8,581.92 as interest and penalties which he claimed to have accrued under Code section 1547 since May 1, 1948, and March 1, 1948, respectively.

On December 28, 1948, complainant paid such interest and penalties under protest. This suit is to recover the above-mentioned interest and penalties. The Trustee and County filed a demurrer to the original bill, contending that the terms of Code section 1535 provide the exclusive remedy for the taxpayer who deems himself aggrieved at the assessment; that this statute requires payment of tax on the questioned assessment as a prerequisite to avoidance of interest and penalties; that since complainant did not comply with Code section 1535 by payment of the tax on the basis of the questioned assessment, interest and penalties accrued under Code section 1547.

It is my view that the action of the Chancellor in overruling the demurrer was correct, but my associates are of the opposite opinion. They hold that by the injunction in Federal Court, complainant prevented the certification of the first assessment to the County Trustee and thereafter, to avoid imposition of interest and penalty, complainant made no attempt on the first assessment to comply with the provisions of Code section 1535, which provides the exclusive way by which a dissatisfied taxpayer may avoid the imposition of interest and penalties. Had complainant under the first assessment, overpaid taxes *under protest*, the State would have been compelled to pay complainant interest on that part of the taxes wrongfully collected. It is only by pursuing the remedy provided by Code section 1535, that the taxpayer can forestall the accrual of interest and penalty under Code section 1547.

This being a decision of a majority of the Court, it results

that the decree of the Chancellor is reversed and the cause remanded for entry of an appropriate decree. Complainant will pay the costs.

(S.) PREWITT, *J.*

APPENDIX "C"

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

No. 516 09 R. D.

ILLINOIS CENTRAL RAILROAD COMPANY, *Complainant,*

vs.

RILEY C. GARNER, COUNTY TRUSTEE, ET AL., *Defendants*

DECREE SUSTAINING DEMURRER AND DISMISSING SECOND AMENDED AND SUPPLEMENTAL BILL

This cause came on this day to be heard upon the demurrer to the Second Amended and Supplemental Bill, and the Court is of the opinion that the disposition of the matter is controlled by a decision of the Supreme Court of Tennessee, previously rendered (190 Tenn. 694), and the Court required thereby to sustain the demurrer and dismiss the Second Amended and Supplemental Bill. And it further appearing to the Court from the statement of solicitor for the complainant that there are no further or other grounds of amendment or supplement to said Second Amended and Supplemental Bill,

It is, therefore, Ordered and Decreed that the demurrer to said Second Amended and Supplemental Bill is dismissed at the cost of the complainant, for which let execution issue.

To which decree the complainant excepts and prays an appeal to the next term of the Supreme Court at Nashville, which appeal is granted upon the complainant giving an appeal bond in the penal sum of $250.00 and thirty days are allowed in which to file said bond.

APPENDIX "D"

NEIL, *C. J.:*

(Filed July 27, 1951. David S. Lansden, Clerk)

ILLINOIS CENTRAL RAILROAD COMPANY

v.

RILEY C. GARNER, County Trustee and Shelby County, Tennessee

SHELBY EQUITY

Hon. Larry Creson, Chancellor

Attorneys for Appellant: Hon. Lucius E. Burch, Jr. and Hon. Edward P. Lyons, Jr., Memphis, Tennessee. Hon. J. H. Wright and Hon. R. C. Beckett, Chicago, Illinois.

Attorneys for Appellee: Hon. Lake Hays and Hon. Henry W. Dunivant, Memphis, Tennessee.

OPINION

On August 1, 1947, the Railroad and Public Utilities Commission of Tennessee made a tentative biennial assessment of state ad valorem taxes of the properties of the Illinois Central Railroad for the years 1947 and 1948. The total amount of the assessment was $35,581,254.00. The railroad excepted and appealed to the State Board of Equalization. The basis of the exceptions was that the assessment was erroneous and void in that the Commission failed to recognize the fact that the Illinois Central Railroad and the Yazoo and Mississippi Valley Railroad Company were one and the same entity; that the Commission had, without authority of law, separated the supposed railway systems into two divisions for the purpose of making its assessment, thereby increasing the assessment in excess of the actual cash value of the railroad's property in the State of Tennessee. On November 6, 1947, the State Board of Equalization overruled the exceptions and approved the combined assessment as made by the Commission.

The next move by the Illinois Central, having exhausted its administrative remedies, was to file suit in the District Court of the United States for the Middle District of Tennessee to enjoin the certification of the assessment to the various counties and municipalities of the State and to restrain the collection of taxes based upon said valuation. The contention made in this suit was that the "due process clause" of the Federal Constitution was being violated, and Article 2, Sections 28 and 29 of the Constitution of Tennessee, was also being violated; that the tax so assessed was void, and that "it would be necessary to have a multiplicity of lawsuits by paying the taxes to the State of Tennessee and to the tax collectors of twelve counties and numerous municipalities and to bring suit for the recovery of such illegal taxes from each of them." The United States District Court granted the temporary restraining order thus prayed for by the complainant.

Concurrently with the pendency of the suit in the Federal Court the railroad filed its petition in the Third Circuit Court of Davidson County, Tennessee, for a writ of certiorari against the Governor and the State Board of Equalization, seeking to have said assessment set aside upon the ground of its alleged illegality.

On January 26, 1948, the Third Circuit Court decreed that the "said assessments are hereby declared to be illegal, null and void and the same are hereby quashed." The cause was remanded to the State Board of Equalization for further proceedings, including the making of a new assessment for the biennium 1947-1948. The judgment of the court remained unappealed from, and the injunction suit in the Federal Court was dismissed without prejudice.

Upon the remand of the cause to the Railroad and Public Utilities Commission the amount of the assessment was reduced from $35,581,254.00 to $28,900,000.00. No exception was taken to this last assessment.

On November 30, 1948, the railroad tendered to the County Trustee of Shelby County, Tennessee, the sum of $107,354.00 which was the amount of taxes due upon the new assessment, but the tender was refused on the ground that there was due and owing "interest and penalties" in the

amount of $8,581.92. This interest and penalties were claimed to have accrued during the period in which the void assessment had been in effect and the date of the tender.

The above amount was paid under protest and suit was then brought against Shelby County to recover it. The Trustee of Shelby County, and Shelby County, demurred to the original and amended bill upon the ground that "insofar as the assessment was inchoate" it resulted from "the affirmative act of the Illinois Central Railroad Company in obtaining a temporary injunction in the Federal District Court"; that it was the duty of the railroad under Code Section 1535 to pay the tax on the questioned assessment and sue to recover, and it could not litigate the assessment and later claim immunity for paying interest and penalties, even though the said assessment had been adjudged as "null and void" by the Third Circuit Court.

The chancellor was of opinion that the assessment having been declared to be "null and void" by a court of competent jurisdiction, the demurrer was not well taken. A discretionary appeal was granted from his action in overruling the demurrer. When the cause came on to be heard in this Court the chancellor's decree was reversed, Mr. Justice Prewitt dissenting. Upon the remand for further proceedings a Second Amended and Supplemental Bill was filed by leave of the court in which the railroad reviewed the former proceedings, complaining that the assessment was void and that "Section 1535 of the Code was not an exclusive remedy of a taxpayer against the collection of taxes based upon an illegal or void assessment; that both the remedies of certiorari and injunction are available in addition to the remedy prescribed by Section 1535 of the Code."

To the foregoing Second Amended and Supplemental Bill, the defendants again demurred and the same was sustained, the chancellor being of opinion that he was bound by the previous opinion of this Court upon the same issue. The cause is now before us on appeal from this ruling of the chancellor.

We have carefully read and considered the record in the case at bar and find that the error assigned on this

appeal is identical with that which was presented in 1950 in the case of Ill. Cent. R. Co. v. Garner, 190 Tenn. 694. In the demurrer to the original bill the County Trustee and the Court made the contention "that Code Section 1535 provides the exclusive remedy for the taxpayer who deems himself aggrieved at the assessment." The Second Amended and Supplemental Bill, which was filed upon the remand by leave of the chancellor, does not differ from the first original bill other than to recite in detail the contents of the bill which was filed in the Federal District Court. The sum and substance of the assignment of error on the present appeal is that the chancellor erred in sustaining the demurrer because:

> "(a) Section 1535 of the Code of Tennessee, as construed by the Honorable Chancellor, would provide the sole and exclusive remedy of a taxpayer against collection of taxes based upon an illegal or void assessment; whereas both the remedies of certiorari and injunction are available in addition to the remedy prescribed by Section 1535 of the Code of Tennessee.
>
> "(b) The decree of the honorable Chancellor is contrary to the final judgments of the Third Circuit Court of Davidson County and of the United States District Court at Nashville, which judgments are final and unappealed from and are res judicata and could not be lawfuly nullified by the learned Chancellor in this case."

Contention is further made that:

> "(d) The decree of the honorable Chancellor establishes the rights and liabilities of Appellant in a manner inconsistent with the previous final judgments of courts of competent jurisdiction, and thereby deprives the Appellant of its property without due process of law and deprives the Appellant of the equal protection of the laws contrary to the Constitution of the United States."

While the argument of learned counsel for appellant is persuasive in that the taxpayer should not be compelled

to pay interest and penalties upon an illegal or void assessment, it does not follow that the chancellor's decree is incorrect. Nor is it correct to say that his decree "establishes rights and liabilities of appellant in a manner *inconsistent with the previous final judgments of courts of competent jurisdiction.*" The United States District Court made no pronouncement adjudging the rights of the parties. The court merely entered a temporary restraining order against certifying the amount of the assessment to the several counties, and later dismissed the cause without prejudice. The effect of the judgment in the Third Circuit Court of Davidson County, Tennessee, was to require the Railroad and Public Utilities Commission to make a new assessment of the properties in question.

Reasoning from an equitable or moral viewpoint the counsel presents a strong case for reversal. But from the standpoint of legislative policy, involving the importance to the State of the prompt collection of taxes, the contention is untenable. Conceding as we do that the judgment of the Third Circuit Court of Davidson County, Tennessee, was correct, in that the assessment was illegal, it does not follow that the payment of taxes can be postponed at the instance of the taxpayer until the amount of the tax is judicially determined. The fact that the *method of making the assessment* and determining the amount of the tax is illegal, or void, is no excuse for a refusal to comply with Code Section, which reads in parts as follows:

> ". . . Provided, that if any railroad or public utility has been or shall hereafter be aggrieved at the assessment so fixed and certified by the board of equalization, such railroad or public utility shall be required to pay the taxes due and owing the State of Tennessee, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceeding that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the State of Tennessee, the counties and municipalities, and any school

district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered in any such proceeding, or in default of such refund, such railroad or public utility is authorized to take credit for the amount of such illegal or excessive tax with interest against any tax thereafter becoming due from and payable by such railroad or public utility, to the State of Tennessee, or county, municipality, road district, school district, or any other taxing district authorized to levy taxes."

It thus plainly appears that if the assessment is excessive or *illegal* the railroad may recover it with interest, or have credit for it upon any later assessment. The taxpayer has suffered no injury by paying his tax as thus prescribed by the Code. Nor has any constitutional right been violated. The statute is mandatory.

Counsel for appellant advances the following as a "Proposition of Law", the same being italicized on the brief:

> *"The Court will not be bound by a former erroneous opinion that has not resulted in the creation of a rule of property and is between the same parties litigant, and this is particularly true where the former opinion resulted only in a remand of the case and did not purport finally to settle the rights of the parties."*

It is thus assumed that our opinion as reported in 190 Tenn. 694, holding that Code Section 1535 was the exclusive remedy of the aggrieved taxpayer, was erroneous. Having followed the express provisions of the statute we cannot do otherwise than to declare that the opinion was correct at the time it was released and it is the law now governing the rights of the parties. In other words Section 1535 of the Code, as amended by Chapter 7 of the Public Acts of 1939, is the exclusive remedy of a taxpayer where there has been an excessive or illegal assessment of his property.

It is further urged upon us as a sound "proposition of law" the following:

> *"Section 1535 of the Code does not provide the only method in which the taxpayer can forestall the accrual of interest and penalties under Code Section 1547, if the assessment is VOID as distinguished from merely EXCESSSIVE or ERRONEOUS."*

Several of the cases cited by counsel, and particularly Briscoe v. McMillan, 117 Tenn. 115, Ward v. Alsup, 100 Tenn. 619, and Smoky Mountain Land Co. v. Lattimore, 119 Tenn. 620, hold that where an ad valorem assessment is challenged on the ground of illegality the remedy of the taxpayer is by certiorari to review the assessment. The several Code Sections upon which these decisions seem to have been rested (1790-1799) do not sustain the contention of the appellant.

In the case of American Can Co. v. McCandless, 183 Tenn. 491, these same sections of the Code are again considered and it is expressly held that the taxpayer's *sole and exclusive remedy* was to pay the tax demanded under protest and then sue within thirty (30) days to recover the tax illegally exacted. In Lyons v. Lay, 179 Tenn. 388, 166 S. W. (2d) 778, Mr. Justice Prewitt, speaking for the Court said: "The payment under the protest statute is applicable in every case, even though in particular instances it may work a hardship." Also in City of Nashville v. Smith, 86 Tenn. 213, 6 S. W. 273, it was held ". . . however unjust or illegal the demand against the city may have been, *the only course left open to it* was to pay the state's part of the same under protest, and then sue for the recovery thereof within 30 days thereafter." (Emphasis supplied.) The foregoing was cited and reaffirmed by Mr. Justice Chambliss in American Can Co. v. McCanless, supra, at page 498. In the same case it is said: "The state does not litigate as an individual, and does not allow its demands for taxes to be held up pending controversy with an individual."

The laws of the State afford adequate protection to every taxpayer against illegal and void assessments. If he elects to litigate with the State and thus postpone the payment

of the tax he does so at the peril of paying interest and penalties. "Even if the taxpayer is successful to the extent of having a portion of the tax invalidated by the courts, he is nevertheless liable for the penalty for failure to pay the portion of the tax sustained." 51 Am. Jur., p. 852, Sec. 957.

Penalties in a sense are odious, but they are of necessity imposed to induce the prompt payment of taxes to the end that the power and authority of the State may not be impaired for lack of revenue.

The assignments of error are overruled and the chancellor's decree is affirmed.

NEIL, *C. J.*

Mr. Justice Prewitt, Mr. Justice Tomlinson, and Mr. Justice Burnett concur.

Mr. Justice Gailor not participating.

APPENDIX "E"

For Publication NEIL, C. J.

(Filed Aug. 31, 1951, David S. Lansden, Clerk.)

SHELBY EQUITY

ILLINOIS CENTRAL RAILROAD COMPANY

v.

RILEY C. GARNER, COUNTY TRUSTEE AND SHELBY COUNTY, TENNESSEE

ON PETITION TO REHEAR

The principal complaint in the petition to rehear, filed by counsel for the railroad, is "that the Court overlooked the fact that the taxes in this case are not *excise* or *privilege* taxes, but are *ad valorem* taxes." It is again urged upon us "that where an ad valorem assessment is challenged on the ground of illegality the taxpayer has the remedy of injunction."

It is true that the cases cited in the original opinion in-

volve the collection of excise or privilege taxes. American Can Co. v. McCanless, 183 Tenn. 491; Lyons v. Lay, 179 Tenn. 388; and City of Nashville v. Smith, 86 Tenn. 213. Conceding, as we do, that the cases referred to involve the collection of *excise* taxes and not *ad valorem* taxes, they nevertheless sustain the proposition that where the statute provides the taxpayer a complete and adequate remedy to compel reimbursement of taxes wrongfully exacted he has no other remedy. There is no reason to seek another and different remedy.

The statute which controlled the Court's opinion in American Can Co. v. McCanless and other cases was enacted in 1873, and brought into the Code as Sections 1793, 1794 and 1795. The intention of the Legislature was to provide for the prompt and efficient collection of "revenue", and at the same time provide the taxpayer an adequate remedy to have reimbursement of all taxes wrongfully exacted. It is provided by Section 1794 that "there shall be no other remedy" for the taxpayer than to sue, within thirty days, and recover it from the taxing authority.

The foregoing Code Sections make no distinction between *excise* taxes and *ad valorem* taxes. They relate to the collection of "*revenue*", and the remedy to recover *revenue* illegally assessed and wrongfully exacted. It is not reasonable to suppose that the Legislature intended to provide an exclusive remedy for citizens charged with the payment of an *excise* tax while others, assessed with an *ad valorem* tax, should be permitted to pursue another and different remedy. In L. & N. R.R. Co. v. The State of Tennessee, et al., 55 Tenn. 663, a case involving the validity of an *ad valorem* assessment upon railroad property, the railroad made no contention that the Act of 1873 did not apply to *ad valorem* taxes, but insisted that it was unconstitutional. While the Court elected to decide the case on its merits, i.e. the validity of the assessment, it made the following comment on the applicability of the statute: "The remedy provided by the statute is ample, speedy and certain, and the indemnity of the injured citizen is absolutely assured."

Now Code Section 1535, under which the assessment was made in the instant case, contains substantially the same provisions as Code Sections 1793, 1794 and 1795, and is applicable alone to railroads and other public utilities. It

expressly requires the taxpayer to pay under protest, if the tax for any reason is alleged to be illegal or unjust, and sue for reimbursement.

The similarity between the provisions of the Act of 1873 and Code Section 1535 requires that they should be given the same construction. It is immaterial that the tax in one case is an *excise* tax and in the instant case an *ad valorem* tax. We are here concerned with the remedy to recover the tax and not the nature of the tax involved.

It is true that the remedy for contesting its tax liability in the case at bar is as indicated in Briscoe v. McMillan, 117 Tenn. 115, 100 S. W. 111; and Ward v. Alsup, 100 Tenn. 619, 46 S. W. 573; i.e. certiorari and supersedeas to the State Board of Equalization. But the railroad is still required to pay the amount assessed and sue for reimbursement. If the court should hold the assessment to be void, or otherwise illegal, the State, Counties and Municipalities, must refund at once the amount each had received under the illegal assessment, "together with such interest as the court may determine to be proper not exceeding the legal rate." Code Section 1793. Code Section 1535 is to the same effect. The judgment of the court, voiding the assessment, would be conclusive of the taxpayer's right to have restitution.

Responding further to the petitioner's insistence "that where an *ad valorem* assessment is challenged on the ground of illegality the taxpayer has the remedy of injunction", we think the great weight of authority supports the Court's opinion that this remedy is available *only* when the taxpayer has not a full, free and adequate remedy at law. Thus in American Airways v. Wallace, 57 Fed. (2d), 878, 879, it is said:

> "No one would contend that the collection of a tax may be enjoined if the taxpayer has a full and adequate remedy at law."
>
> * * * * * * *
>
> "The authorities upon this question are uniform and too numerous for collation."

See also Elgin v. Hessen, 282 Fed. 281, to the same effect.

In Cooley on Taxation, Vol. 4, Fourth Edition, Section 1647, it is said:

"Injunctive or other equitable relief will not be denied on the ground of a remedy at law *unless such remedy is adequate and complete;* and if it is doubtful whether there is an adequate remedy at law, equity will take cognizance."

* * * * * * *

"Payment of a tax and a remedy by suit to recover back the taxes paid where they are illegal or unauthorized is generally held such an adequate remedy as to preclude injunctive or other equitable relief against the collection of the tax." (Emphasis supplied.)

But aside from the foregoing authorities the petitioner makes no contention that the "payment under protest" statute does not provide a complete and adequate remedy; nor is it even suggested that it is unconstitutional.

In the final and concluding paragraph of the petition complaint is made "that nowhere in the opinion of the Court is there a discussion of the point" to the effect "that equity does not permit the imposition of a penalty or interest if the contest of tax liability has been undertaken in good faith." The point was very forcefully made on the brief of counsel and also in oral argument. But it was pretermitted because we felt that the provisions of the statute was controlling rather than the principles of equity. There is no provision in the statute relieving a taxpayer from liability for interest or a penalty where a contest of his tax liability is undertaken in good faith. If the petitioner may for that reason postpone the payment of taxes it follows that every other railroad and every public utility may do likewise with the result that the statute would become a dead letter.

The petition to rehear is denied.

NEIL, *C. J.*

Mr. Justice Prewitt, Mr. Justice Tomlinson and Mr. Justice Burnett concur.

Mr. Justice Gailor not participating.

83

Office - Supreme Court,
FILED
JAN 17 1952
CHARLES ELMORE CRO
CL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

vs.

RILEY C. GARNER, County Trustee of Shelby County, Tennessee, and SHELBY COUNTY, TENNESSEE.

No. 460

PETITION TO REHEAR

CHARLES A. HELSELL,
135 East Eleventh Place,
Chicago, Illinois;

LUCIUS E. BURCH, JR.,
1006 Exchange Building,
Memphis, Tennessee,
Attorneys for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

vs.

RILEY C. GARNER, County Trustee of Shelby County, Tennessee, and SHELBY COUNTY, TENNESSEE.

No. 460

TO THE HONORABLE JUDGES OF THE SUPREME COURT:

Comes now the Appellant and respectfully prays the Court to rehear the matters determined in its judgment of January 2, 1952, which is:

> "*PER CURIAM*: The appeal is dismissed for the want of a substantial federal question."

It is the respectful insistence of the Appellant that the questions raised on appeal present substantial federal questions.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

(A). THE SUPREME COURT OF THE STATE OF TENNESSEE CONSTRUED SECTION 1535 OF THE CODE OF TENNESSEE AND RELATED STATUTES TO SANCTION THE SEIZURE OF APPELLANT'S PROPERTY UNDER DURESS FOR FAILURE TO PAY A TAX THAT WAS NOT LEVIED AND WAS NOT DUE AND COULD NOT HAVE BEEN PAID BY APPELLANT UNDER PROTEST OR OTHERWISE.

We regard as extremely "substantial" the question of whether a penalty can be assessed and collected against a taxpayer who never had any opportunity to pay the tax upon which the penalty was assessed. That is exactly what happened in this case. Under the Tennessee Statutes, which are summarized in the Second Amended and Supplemental Bill, and in the Jurisdictional Statement, pp. 1-6, no tax is levied and there is no opportunity for payment until the State Board of Equalization certifies its assessment of the total valuation of taxpayer's property subject to taxation to the Railroad and Public Utilities Commission nor thereafter until the Railroad and Public Utilities Commission computes the value of property subject to local taxation in each county and municipality and certifies the amount to each. Then and only then can the taxpayer ascertain the amount of the tax due, obtain a tax bill, make payment and get a receipt from the collecting authority. In this case the taxes were never due and payable and the doing of the act necessary to make the taxes payable was enjoined by the U. S. District Court and thereafter the *assessment* was, by the final judgment of a court of competent jurisdiction, de-

clared to be null and void and the assessment quashed. At no time were the collecting officers in position to notify the appellant of the amount of tax due, accept payment thereof and issue a receipt. Immediately the question arises, what did this taxpayer do or fail to do to justify the imposition of a penalty? The record does not furnish an answer.

It does not require citation of authority to establish the proposition that a penalty may not be imposed except for some wrongful act or omission and indeed the proposition is so elemental that no litigation has arisen to create jurisprudence on the identical question. Since Magna Charta, it has been settled that "no man ought to be taken or imprisoned * * * or deprived of his life, liberty or property but by the judgment of his peers, or by the law of the land." What "law of the land" did the appellant violate to justify the imposition of the penalty? It is true that the appellant successfully questioned the assessment, but the injunction against the levy and the subsequent quashing of the entire assessment were not the acts of appellant. The judgments of courts are not the acts of the parties but judgments are, as Blackstone puts it, "the very voyce of law and right." Moreover, to impose a penalty for seeking and obtaining relief has always been held by this Court to be a deprivation of property without due process of law. Many penalties imposed upon *unsuccessful* litigants seeking a determination of their rights have been stricken down, and diligent search fails to disclose a single case where a penalty has been imposed against a *successful* litigant. The general jurisprudence on this subject is voluminous but the following cases illustrate the principle announced by the Court.

Ex Parte Young, 209 U.S. 123;

Ward v. Board of County Commissioners, 253 U.S. 17, 64 L. Ed. 751;

Carpenter v. Shaw, 280 U.S. 363, 74 L. Ed. 478;
McFarland v. Central Natl. Bank, 26 F. 2d. 890;

Security National Bank of Watertown v. Young 55 F. 2d 616;

54 Am. Jur. United States Court, Sec. 8;

Herndon v. Railway Co., 218 U.S. 135, 54 L. Ed. 970;

Western Union Telegraph Company v. Julian, 169 Fed. 166;

Seaboard Air Line Railroad Co. v. Alabama Railroad Commission, 155 Fed. 792.

If the rule is to be announced that a taxpayer who successfully contests its tax liability and who pays the tax when lawfully assessed and at the first opportunity after the tax is levied is to be penalized for successfully questioning the original assessment, it is more than "substantial"—it is cataclysmic and we believe that it was only the insufficiency of advocacy that failed to impress the Court with the importance of the question.

(B). THE SUPREME COURT OF THE STATE OF TENNESSEE, IN CONSTRUING SECTION 1535 OF THE CODE OF TENNESSEE AND RELATED STATUTES, HELD THAT APPELLANT MIGHT BE REQUIRED TO PAY A PENALTY FOR FAILURE TO PAY A TAX WHICH, ADMITTEDLY, HAD NOT BEEN ASSESSED IN CONFORMITY WITH LAWS OF THE STATE OF TENNESSEE.

In this case we are not dealing with the question of excise or franchise taxation but with the question of ad valorem taxation. Excise and franchise taxes are self-executing and mere exercise of the franchise or excise results in liability for the tax. Ad valorem taxation involves entirely different principles. Liability for the tax does not depend upon mere ownership of the property but upon an *assessment* and a *levy*. As demonstrated in the previous section, there never was at any time a levy and the property never became subject to the varying rates imposed by the several counties and municipalities. The assessment was declared to be void and was set aside by the final judgment of a court of competent jurisdiction, which final judgment is in full force and effect and unappealed from. In cases of ad valorem taxation the collection of interest, penalties or, indeed, of the tax itself, in the absence of a valid assessment, is unconstitutional.

51 Am. Jur., Taxation, Sec. 647;

61 C. J., Taxation, Sec. 759 b;

2 Cooley, Constitutional Limitations, 1108 (8th ed., Carrington);

Judson, Taxation, Sec. 496.

Commonwealth v. Chesapeake O. & S. R. Co., 141 Ky. 633, 135 S. W. 559;

Freiberg Co. v. Dawson, 274 Fed. 420;

Tumulty v. District of Columbia, 102 F. 2d. 254;

C. B. & Q. R.R. Co. v. Chicago, 166 U.S. 226;

County of Santa Clara v. Southern Pacific Railroad Co., 118 U.S. 394, 30 L. Ed. 118;

Malone v. Williams, 118 Tenn. 390.

Territory v. Perea, 62 Pac. 1094.

Dravo Contracting Co. v. James, 11 F. 2d. 242, 147 A.L.R 135.

Marr v. Enloe, 9 Tenn. 451.

We believe this question to be substantial.

(C). THE SUPREME COURT OF THE STATE OF TENNESSEE, IN ITS DECISION CONSTRUING SECTION 1535 OF THE CODE OF TENNESSEE AND RELATED STATUTES TO PERMIT THE IMPOSITION OF A PENALTY FOR SUCCESSFULLY RESORTING TO THE COURTS OF THE UNITED STATES TO OBTAIN RELIEF AND IMPOSED A PENALTY UPON APPELLANT FOR OBTAINING ADEQUATE RELIEF UNDER THE LAWS OF THE UNITED STATES INSTEAD OF BEING CONTENT WITH THE LIMITED AND INADEQUATE REMEDIES PROVIDED BY SAID SECTION 1535 OF THE CODE OF TENNESSEE.

At the time the tentative assessment was made against the taxpayer it had two alternatives available. One was to sit idly by and wait until the assessment was extended and the levy made by the various counties and municipalities and thereafter pay the taxes under protest and file some forty separate suits for the recovery of the tax. This would have required a multiplicity of actions with no certain hope of recovery, for it is well known that judgments against counties and municipalities are frequently uncollectible. The other alternative was to enjoin the extension of the taxes and have the assessment quashed. This latter course the taxpayer successfully pursued. The Supreme Court of Tennessee has now said that no penalty would have been assessed had the tax-

payer followed the first alternative but a penalty has been assessed for successfully resorting to the courts to obtain exactly the same ultimate relief. It is not only "substantial" but, as far as we are able to find, unprecedented to permit a penalty to be assessed against a litigant for successfully resorting to legal remedies. The effect of the decision of the Supreme Court of Tennessee is to say that, if the remedy prescribed by Section 1535 of the Code of Tennessee had been pursued, no penalty would have been assessed but, because the same relief was obtained by resorting to the courts of the United States, a penalty will be assessed. This is contrary to any previous adjudications of this Court.

Security National Bank of Watertown v. Young, 55 F. 2d. 616;

Ward v. Board of County Commissioners, 253 U.S. 17, 65 L. Ed. 751;

Carpenter v. Shaw, 280 U.S. 363, 74 L. Ed. 478;

McFarland v. Central Natl Bank, 26 F. 2d. 890;

Ex Parte Young, 209 U.S. 123;

Am. Jur., United States Court, Sec. 8;

Herndon v. Railway Co., 218 U.S. 135, 54 L. Ed. 970;

Western Union Telegraph Company v. Julian, 169 Fed. 166;

Seaboard Air Line Railroad Co. v. Alabama Railroad Commission, 155 Fed. 792.

(D). THE SUPREME COURT OF THE STATE OF TENNESSEE REPUDIATED AND REFUSED FULL FAITH AND CREDIT TO THE FINAL JUDGMENTS OF THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE, AND OF THE UNITED STATES DIS-

TRICT COURT AT NASHVILLE, EVEN THOUGH SAID JUDGMENTS HAD BEEN ENTERED IN THE SAME CAUSE, BETWEEN THE SAME PARTIES AND NO REVIEW OF SAID JUDGMENTS WAS SOUGHT BY ANY PARTY AT ANY TIME.

The United States District Court in issuing the injunction adjudged that Section 1535 of the Code of Tennessee did not provide the sole and exclusive remedy available to a taxpayer confronted with a void assessment. The Circuit Court of Davidson County, Tennessee, in its final judgment quashing the assessment made the same adjudication. No appeal was sought. Shelby County, the appellee, notwithstanding these judgments, collected under duress the penalty which forms the basis of this suit, making the contention that the failure of the appellant to follow Section 1535 of the Code of Tennessee was wrongful notwithstanding that the United States District Court at Nashville and the Circuit Court of Davidson County had both adjudicated that Section 1535 of the Code of Tennessee *did not* furnish the sole and exclusive remedy under the facts of this particular case. To sustain the contention of Appellee is contrary to the previous adjudications of this Court.

Chicago Cemetery Association v. United States, 19 F. Supp. 228, 50 C.J.S., p. 11;

Cooley, Constitutional Limitations, Vol. 1, p. 108;

Cooley, Constitutional Limitations, Vol. 2, Chapter 11 p. 733;

Twining v. New Jersey, 211 U.S. 78, 53 L. Ed. 97;

Embry v. Palmer, 107 U.S. 20, 27 L. Ed. 456;

Turnbull v. Payson, 95 U.S. 418;

Leadville Coal Co. v. McCreery, 141 U.S. 475, 35 L. Ed. 824.

This question is substantial. If the decision of the Supreme Court of Tennessee is to stand, it amounts to a holding that the doctrine of res judicata, which has been a part of the common law since the decision of the Duchess of Kensington's Case, can be abrogated without denying due process of law, and it further means that a state court can, in a collateral action disregard the decision reached in the United States District Court in the same matter between the same parties.

SUMMARY.

We confidently assert, after the most extended legal research of which we are capable, that with the exception of the opinion of the Supreme Court of Tennessee in this case, not a single case can be found in any jurisdiction that sustains *any* of the following conclusions:

(a) Permits the imposition of a penalty where the taxpayer never had an opportunity to pay the tax.

(b) Permits the collection of ad valorem tax, penalty or interest in the absence of a valid assessment.

(c) Permits the imposition of a penalty of successfully obtaining judicial relief against injustice by *successfully* pursuing remedies of the taxpayer's own choosing rather than pursuing other remedies which, in the opinion of the taxpayer, were inadequate.

(d) Sanctions the refusal of full faith and credit to the final judgments of courts of competent jurisdictions in the same cause and between the same parties, which final judgments were never questioned on appeal by any party.

No authority can be found to sustain *any* of these propositions, but the opinion of the Supreme Court of Tennessee approves *all* of them.

In the Jurisdictional Statement no attempt was made to argue the substantiality of these questions because, as we construed the rules of the Court, citation of authorities is not invited except only those cases which sustain the jurisdiction of the Court. The Rules of the Court (Rule 12) direct the citation of cases believed to sustain jurisdiction but do not invite the citation of other authority. We believe that, if permitted to do so, we can convince the Court by brief and argument that the appellant has been deprived of its property without due process of law.

Respectfully submitted,

CHARLES A. HELSELL,
135 East Eleventh Place,
Chicago, Illinois;

LUCIUS E. BURCH, JR.,
1006 Exchange Building,
Memphis, Tennessee,
Attorneys for Appellant.

CERTIFICATE.

The undersigned, being duly sworn, says that he is one of the attorneys for the appellant, that the sum in controversy is already in the possession of the appellee and has been since the institution of the action, that there is no reason for the appellant to seek delay and that the purpose of this petition is not to delay a final determination of the cause, and that copy of the above petition to rehear was served by United States mail upon the Honorable Lake Hays, counsel of record for appellee, this the.....day of January, 1952.

.....

Sworn to and subscribed before me this.....day of January, 1952.

.....
Notary Public in and for
Shelby County, Tennessee

My Commission expires

.....

No. 460. ILLINOIS CENTRAL RAILROAD CO. *v.* GARNER, COUNTY TRUSTEE OF SHELBY COUNTY, ET AL. Appeal from the Supreme Court of Tennessee. *Per Curiam:*

The appeal is dismissed for the want of a substantial federal question. *Charles A. Helsell* for appellant. Reported below: 193 Tenn. 91, 241 S. W. 2d 926.